89- 1378

No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AVRAM MACY KLAVAN, PETITIONER

v.

GARRIE JOAN KLAVAN, RESPONDENT

Petition For a Writ of Certiorari
To The Supreme Judicial Court
Of Massachusetts

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48 pp

QUESTION PRESENTED

Whether a state court, consistent with due process, may assert personal jurisdiction over a non-resident defendant whose sole contact with the state was a single visit during which he was served with process.

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IN THE SUPREME COURT OF
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No.

AVRAM MACY KLAVAN, PETITIONER

v.

GARRIE JOAN KLAVAN, RESPONDENT

**Petition For A Writ Of Certiorari
To The Supreme Judicial Court
Of Massachusetts**

Avram Macy Klavan petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (App., infra, 1a-6a), the oral ruling of the Massachusetts

Probate and Family Court denying the motion to dismiss for lack of personal jurisdiction (id. at 8a-9a), and the final decision of the Probate and Family Court (id. at 10a-33a) are unreported.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on October 18, 1989 (App., infra, 1a), and the order denying the petition for rehearing was issued on November 30, 1989 (id. at 7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

This is a divorce action brought in the Commonwealth of Massachusetts, the wife's state of residence, against petitioner, her non-resident husband. Petitioner's only contact with the state was a single visit made at his wife's request during which he was served with

process. Petitioner contends that the Supreme Judicial Court of Massachusetts erred in holding that the state court's assertion of personal jurisdiction over him comports with the Due Process Clause of the Fourteenth Amendment.

1. Petitioner married respondent in New York in 1966. The couple lived in Vermont for most of the duration of their marriage. They began experiencing marital problems in 1981. In 1983, petitioner moved from Vermont to Alaska. Respondent remained in Vermont until 1985, when she moved to Massachusetts. App., infra, 1a-2a.

On or about August 6, 1986, petitioner travelled to New York to visit his ailing mother. Shortly after arriving in New York, he spoke to respondent by telephone. Petitioner proposed that they meet in Vermont in an effort to

reach a divorce settlement. Respondent asked petitioner to come to Massachusetts instead. He declined. After respondent "became hysterical and screamed that [petitioner] had to come to Boston so that [they] could talk," petitioner acquiesced and thereafter advised respondent of his flight plans. When petitioner stepped off the plane at Logan Airport in Boston on August 14, he was served with a summons and complaint for divorce. App., infra, 2a-3a.

2. Petitioner filed a special appearance and a motion to dismiss in the Massachusetts Probate and Family Court. The motion, accompanied by petitioner's uncontroverted affidavit, asserted that Massachusetts lacked personal jurisdiction over him. Petitioner contended, and respondent did not contest, that the Massachusetts long-arm statute did not

confer jurisdiction over petitioner, because Massachusetts did not serve as "the marital domicile of both parties * * * for at least one year within the two years immediately preceding the commencement of the action." Mass. Gen. L. ch. 223A, § 3(g). Petitioner further argued that in light of respondent's hidden motive in imploring petitioner to come to Boston, service of process on petitioner when he arrived in the Commonwealth was not an adequate basis for personal jurisdiction either.

The Probate and Family Court denied the motion to dismiss from the bench without stating its reasons. It proceeded to try the divorce action and entered a judgment of divorce nisi on February 10, 1988, dividing the marital assets and awarding alimony. App., infra, 10a-33a.

Petitioner then appealed the denial of the motion to dismiss to the Appeals Court of the Commonwealth of Massachusetts. In his opening brief, petitioner again pointed out -- and respondent again did not dispute -- that he lacked sufficient minimum contacts with Massachusetts to justify the Commonwealth's exercise of personal jurisdiction under the long-arm statute. Appellant's Br. 6-7 & n.2. Petitioner also again argued that jurisdiction could not be predicated on service of process during a single trip to Massachusetts taken as a result of respondent's deceptive request. Id. at 12, 15-16. Respondent responded by asserting that the Massachusetts courts had personal jurisdiction over petitioner simply "as a result of [his] being served while in the Commonwealth." Appellee's Br. 4.

After briefing, the Supreme Judicial Court transferred the case to its own docket and heard argument. Expressly finding that respondent had not tricked petitioner into coming to Massachusetts, and implicitly holding that service of process is enough to justify assertion of personal jurisdiction, the Supreme Judicial Court affirmed the denial of the motion to dismiss. App., infra, 1a-6a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-472 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Accordingly, to be

subject to the jurisdiction of a state's courts, a person must have "purposefully avail[ed himself] of the privilege of conducting activities within" that state. Hanson v. Denckla, 357 U.S. 235, 253 (1958). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" Burger King, 471 U.S. at 475 (citations omitted).

In this case, the Massachusetts courts asserted personal jurisdiction over petitioner based solely upon the fact that he was served with process during a single visit to the Commonwealth. It is undisputed that petitioner had never transacted any business in Massachusetts, had never lived in the

Commonwealth, and, other than a single vacation with respondent in the early years of their marriage, had never "purposefully availed himself" of the privilege of conducting any activities in the Commonwealth. The case thus starkly raises the issue of whether service of process by itself is sufficient to satisfy the constitutional requirement that states refrain from exercising jurisdiction over persons that have not established meaningful "contacts, ties, or relations" there.

That very issue is currently before the Court in Burnham v. California Superior Court, No. 89-44, which is scheduled for argument on February 28, 1990. In Burnham, this Court will determine whether the California courts may exercise personal jurisdiction over a husband who was served with process during one of

his occasional trips to California to visit his children (who were living with his wife there). A holding that service of process is not by itself sufficient to justify the exercise of personal jurisdiction would be dispositive of the instant petition. */ For that reason, the

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*/ Indeed, this is an even stronger case than Burnham for holding that due process is not satisfied by the mere service of process. In Burnham, the nonresident defendant was physically present in the forum state on several occasions, for business and personal reasons, both before and after the service of process. Furthermore, Mr. Burnham allegedly helped to relocate his wife and children in California, knowing that divorce proceedings were contemplated. Here, by contrast, petitioner visited Massachusetts only once in the last two decades, when respondent demanded that he come to Boston rather than Vermont to discuss their marital problems, and respondent and her children moved to Massachusetts without the consent or assistance of petitioner.

petition in this case should be held for disposition in light of the Court's decision in Burnham.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in Burnham v. California Superior Court, No. 89-44.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX A

N-5067 S.J.C.

GARRIE JOAN KLAVAN
vs. AVRAM MACY KLAVAN,

October 18, 1989.

Practice, Civil, Service of process.

Avram Macy Klavan (husband) appeals from a judgment of divorce from Garrie Joan Klavan (wife) on the ground that the Probate and Family Court for Norfolk County lacked personal jurisdiction over him. He claims that service on him was invalid because it was obtained through the fraud and deceit of the wife. We transferred the case to this court on our own motion. We affirm.

The parties were married in New York in 1966. They resided in Vermont for most of the duration of the marriage. After marital difficulties surfaced in 1983, the husband moved from Vermont to

Alaska. The wife moved to Massachusetts in 1985. The parties saw each other from time to time and made various unsuccessful efforts at reconciliation. The parties also discussed divorce. According to the husband's affidavit, he travelled to New York on or about August 6, 1986, and spoke by telephone to the wife at some time after his arrival. The husband wanted to meet the wife in Vermont; she wanted him to come to Boston. When he refused, according to his affidavit, "She became hysterical and screamed that I had to come to Boston so that we could talk." The husband then agreed to come to Boston.

On August 13, 1986, the wife filed a complaint for divorce, dated August 8. On August 14, when the husband arrived at Logan International Airport, he was served with the complaint for divorce and

a summons. The husband filed a special appearance and a motion to dismiss the complaint for lack of personal jurisdiction. The trial judge denied the motion. A judgment of divorce nisi entered on February 10, 1988. The sole issue on appeal is whether the judge erred in denying the husband's motion to dismiss for lack of personal jurisdiction.

Although we have not yet ruled whether service of process should be set aside if a person has been induced by fraud or trickery to come within the jurisdiction of a Massachusetts court for the purpose of procuring service on him, other courts have set aside such service of process. See, e.g., Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 256 (1909); Coyne v. Grupo Indus. Trieme, S.A. de C.V., 105 F.D.R. 627, 629 (D.D.C. 1985); E/M Lubricants, Inc. v. Microfral,

S.A.R.L., 91 F.R.D. 235, 236-238 (N.D. Ill. 1981); Willametz v. Susi, 54 F.R.D. 463, 464-465 (D. Mass. 1972). See generally Annot., Attack on Personal Service As Having Been Obtained By Fraud or Trickery, 98 A.L.R.2d 551 (1964).

If we were to recognize the doctrine of fraudulent enticement, it would not aid the husband. The husband's affidavit does not set forth any fraudulent action, representation, or statement by the wife that was relied on by the husband. See, e.g., Willametz, supra at 464-465; E/M Lubricants, Inc., supra at 237-238. The husband's affidavit asserts that the wife "became hysterical and screamed." Those facts do not constitute a representation of any kind, let alone fraud, trickery, or fraudulent representation.

The husband argues that the "deceit lies in the Wife's failure to disclose

that she would serve [him] with process upon his arrival in Massachusetts." We disagree. Silence is deceitful only where circumstances give rise to a duty to speak, and such duty is imposed only "where the defrauding party has made statements which are subsequently found to be inaccurate and where he knows or should know that the other party is relying on the inaccurate statements." E/M Lubricants, Inc., supra at 237, and cases cited. Hysteria and screaming does not describe an inaccurate statement. Thus, the wife was under no duty to disclose any service that may have been impending. 1/

1/ Alternately, the husband relies on a number of cases holding that fraudulent enticement exists where the defrauding party induced the other party to enter the jurisdiction by agreeing to discuss a settlement. See, e.g., E/M Lubricants, Inc., supra at 237 (finding the defendant's president offered to enter the jurisdiction for the sole purpose of negotiating a settlement); Coyne, supra at

(Cont'd)

On appeal, the wife asks for attorney's fees. That motion is remanded to the Probate and Family Court where such fees may be allowed in the judge's discretion. The judgment of divorce is affirmed.

So ordered.

Alan S. Geismer, Jr., for Avram Macy Klavan. Jay S. Gregory for Garrie Joan Klavan.

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628 (during the weeks preceding the filing of his suit, the plaintiff repeatedly urged the defendant's representative to enter the jurisdiction to settle their dispute). Here, the wife merely asked the husband to come to Boston to talk -- the husband's affidavit does not disclose whether they were to discuss a "settlement," a divorce, or a reconciliation. The record clearly shows that in the months prior to service, the couple met twice, in Alaska and Vermont, in an effort to reconcile. No divorce proceedings were pending in any jurisdiction and "[n]o mention was made of divorce" during the telephone conversation. Therefore, there is no evidence that the wife agreed to settlement negotiations, and the husband's reliance on those cases is misplaced.

APPENDIX B

SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS 02108

(617) 725-8086

JEAN M. KENNETI
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

November 30, 1989

Alan S. Geismer, Jr., Esq.
KASSLER AND FEUER
85 Devonshire Street
Boston, MA 02109

Dear Attorney Geismer:

Re: SJC-5067
GARRIE JOAN KLAVAN vs.
AVRAM MACY KLAVAN

Your Petition for Rehearing of the above-captioned appeal has been considered by the Court and was denied.

Very truly yours,
/s/
Jean M. Kennett,
Clerk

cc: Jay S. Gregory, Esquire
POSTERNAK, BLANKSTEIN & LUND
100 Charles River Plaza
Boston, MA 02114

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

Probate Court
Dedham Division
No. 86D1093-D1

Klavan

vs

Klavan

Atty. for
Garrie Klavan: Peter Zupcofska, Esq.

Atty. for
Avram Klavan: Paul M. Kane, Esq.
McGrath & Kane
4 Longfellow Place
Boston, MA 02114
(617) 523-5600

Judge

On the Motion to Dismiss, I have in fact read the Motion and both submissions....

Atty

Then I will rest on the Motions and the affidavit.

Judge

I will be happy to hear your argument if you wish to, if you want to say anything further on it.

Atty

No, I think that's all set out there and the Court has indicated that it has read the appropriate pleadings.

Judge

Well, I am going to deny the Motion to Dismiss. Now, there's a Motion for a financial statement. Is your client with you today?

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. PROBATE & FAMILY COURT
NO. 86D 1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

vs.

AVRAM MACY KLAVAN,
Defendant

MEMORANDUM, FINDINGS AND ORDER

This is a Complaint for Divorce filed by Garrie Joan Klavan (Garrie) against Avram Macy Klavan (Avram) on the grounds of cruel and abusive treatment and irretrievable breakdown of the marriage. Plaintiff at the time of the divorce sought custody of two minor children, Arnie and Michael. The plaintiff is also seeking a division of the assets under Massachusetts General Laws, Chapter 208, Section 34. The case was originally heard on June 4, 1987.

However, a mistrial was declared and the case recommenced on September 14, 1987. It was also heard on September 15th, 16th and 17th, 1987 followed by a hearing on a contempt on November 10, 1987. All matters were transcribed, however, the stenographer did not make the transcript available to the Court after repeated requests. The Court has proceeded on the basis of one transcript and its notes.

MEMORANDUM

The parties were married in New York on May 29, 1966. It was the first marriage for each. Two children were born of the marriage: Arnie, who is now 20 years old and in excellent health, and Michael, who is 18 years old and also in excellent health. At the time of the hearing Arnie was living with her mother in Brookline, Massachusetts, and Michael

was living with his father in Anchorage, Alaska, where he was a freshman at the University of Alaska. At the time of the marriage the wife was a student at a community college in New York majoring in liberal arts. Avram was an airman third class in the Air Force. The parties moved to Biloxi, Mississippi, where Avram was stationed. Shortly thereafter, they moved to an Air Force base in Plattsburgh, New York, where Avram had been transferred. While at Plattsburgh, Garrie worked until she was seven (7) months pregnant and her funds were used for family purposes. Avram was discharged from the Air Force in February of 1968. The family now consisting of Garrie, Avram and Arnie, moved to Potsdam, New York, where they lived in a mobile home and where Avram completed a semester at Potsdam College and where,

after Arnie was born, Garrie continued to work. Shortly thereafter, Avram went to work for IBM in Vermont and the parties moved to Burlington, Vermont. Avram, while working as an Associate Engineer, continued his education and received an Associates Degree in business and economics. (Michael was born in November of 1968 while Avram was at Clarkson University in Potsdam). Sometime in 1969 the parties purchased the home in Burlington. As the family grew, Garrie became a housekeeper; cleaning, sewing, making curtains, bedspreads, painting and taking care of the children. She also worked for a year when Michael became of school age. She returned to school for a short time and commenced work again in November 1975 as a Court reporter. She was heavily involved in the mid 1970's in activities involving her children and in

community activities. She was principal of the local Hebrew school for a period and had administrative duties.

During the early years the parties lived in Vermont they had a normal social life, entertained, had family and friends over for dinner and took vacations together visiting Sturbridge, Massachusetts, and Montreal, cruising in Maine, trips to New York City and Florida. Their house was a meeting place for friends and family.

Garrie is approximately 41 years old and Avram is approximately 42 years old. Although Avram's health is excellent, Garrie's health is a cause for some concern. In 1972 she had a gallbladder operation with a difficult recovery, during which she experienced pain in her spine and down her right side which made housework difficult. She ended up doing

some shopping and Avram did help some with the housework. She depended on the children for assistance. About three years later she experienced a change in her voice -- it became deeper -- and the development of excessive body and facial hair. She did not receive treatment until early in 1982 at which time she had an adrenal tumor removed. She was hospitalized for this treatment for about ten (10) days in March of 1982. After the removal of the adrenal tumor she experienced mood swings, crying jags, depression, and an inability to sleep. She continues to suffer from insomnia, depression and pain, which adversely affects her ability to work efficiently. She also suffers from back pain which has a high probability of continuing. I do not find that she currently has any carcinoma or is suffering from

Cushing syndrome, nor do I find that there is a reasonable probability of the carcinoma metastasizing. Garrie has also suffered a deterioration of the jaw bone with subsequent tooth loss.

Avram started his employment with IBM in 1970 and had received consistent advances from a technician to a position of senior designer. By 1981, however, he was desirous of leaving IBM and going into business for himself. At that time the marriage had been strained for a couple of years and Garrie was receiving marriage counselling. However, repeated fights and arguments continued. Some joint counselling was entered into sometime prior to 1981. This was done on Garrie's initiative in order to preserve the marriage. In 1981, prior to Avram leaving IBM, which he did on his own accord, the parties entered into a joint

business operation -- the opening of a delicatessen in a shopping center. They entered into this jointly with the understanding that this was a way for Avram to leave IBM and become independent. The business operation was not successful. The bulk of the work -- food preparation, personnel management, meeting the public -- was done by Garrie. Avram handled the financial matters. In late 1982, shortly after Garrie's surgery, Avram left IBM to be at the restaurant full time. At that time the only medical insurance the parties had was what IBM provided. While Garrie was concerned because of lack of medical insurance -- if Avram left IBM -- she did not object thereto. Avram's leaving IBM was irresponsible. The delicatessen business continued to deteriorate and in the Spring of 1983, Avram took a job selling

hearing aids, a job to which he was not suited. Garrie, because of her illness, was unable to be active in the business between March and June 1982. She was also restricted in physical activities. Avram assisted by trying to keep the business going, all to no avail. During her post-operative period, Avram was not reasonably supportive of her. In addition, money was borrowed from Garrie's mother for a total amount of $30,000.00. Other monies were borrowed from friends. In the Spring of 1983 they decided to sell the business, but the attempt to sell was unsuccessful. In August of 1983, Avram, although he had no employment proposals, left for Alaska for the purpose of securing employment and immediately thereafter the business was shut down as a result of Garrie being served eviction notice. When Garrie

informed Avram a violent disagreement between the parties ensued in which Avram, via a telephone conversation from Alaska, threatened to kill Garrie. I find that Avram deserted his family when the business was failing. After Avram left for Alaska, Garrie again sought counselling because she needed help coping.

Following the collapse of the business, the children worked, Garrie received unemployment insurance and also did some catering services and worked as a part-time cook and on other part-time jobs. The children continued to help by working at odd jobs and turning what money they earned into the household. Michael began to have trouble in school and the family situation was deteriorating. By January 1985 Garrie was seeking fuel assistance allowance, food stamps

and other aid programs. Garrie was still desirous of seeing whether or not the marriage could work and in January 1985 she went to Alaska where Avram had been working since February 1984 there she found that Avram had been living with another woman. That ended all prospects of a reconciliation.

Garrie left Vermont in July of 1985 and started work as an operator-manager of a student kosher kitchen in Hillel House at Harvard University. The children assisted her. She also did some individual catering. Her work at Hillel House was unsatisfactory to Hillel House, and she left in January of 1987. Her salary, including work outside Hillel House and at Hillel House averaged approximately $22,000.00 per year. She was unemployed from January 1987 until July of 1987 and she is now employed as a

transcriber for a Court reporter at 20 hours a week. She now earns approximately $120.00 a week. She is capable of doing some catering work and some secretarial work. However, I find that she is not capable of self-support.

Avram secured employment in Alaska in late October or early November of 1983. He sent no money back to Garrie until January 1984. He had several jobs until March 1984 when he finally received steady employment. He is presently employed as a camp utilities operator at Arco-Alaska. He has made a hobby out of computers and has since being in Alaska spent approximately $5,000.00 for computer and other electronic and communications equipment. This was money spent solely to satisfy his hobby of working with such equipment. The money could have been used to support his family.

Arnie is now 20 years old. Her relationship with Avram was strained in 1982 when Avram lost his temper and screamed at her, bruised her and called her trash. She was of great support to Garrie but became frustrated because of inability to participate in social activities. She turned in her earnings to the family household. Avram did not attend her high school graduation in 1985. She attended Stern College in New York as a freshman with approximately 20% of her tuition, board and room paid by Avram's mother. She worked the first summer after Stern College and then went to Bar-Ilan University in Israel on full scholarship. She returned in June 1987 and is now living with Garrie. While Arnie was at Stern and the University Avram contributed minimally to her needs. Arnie is desirous of continuing

her college education. She is capable of self-support.

Michael now lives with his father in Alaska where he is attending the University of Alaska. Until the parties separated his relationship with Garrie was normal. Garrie prepared him for his confirmation (Bar Mitzvah) at age 13 in accordance with Jewish ritual. She did the bulk of the preparatory work for the parties in connection with the Bar Mitzvah. Thereafter, it became severely strained. Sometime in 1986 he was sent to Garrie's mother's house in Florida. He completed high school while he was in Florida.

The marital home was purchased in 1970. A family room was constructed as an addition in 1974. This was done with money borrowed from the FHA and IBM, Avram's employer. Garrie continued to

live in the marital house with the children (until Michael went to Florida and Arnie went to Stern College) at which time she moved to Massachusetts. She leased the home for 10½ months and used the rentals for expenses for herself and the family. The home has since been sold.

Avram is now living in Alaska in a rented apartment, one-half of the costs of which are shared by a female companion. Avram has a gross weekly income of $1,051.83. He claims only himself as a deduction from his gross income. In addition, he has a savings plan deduction from his salary of $48.53 per week. His weekly living expenses, excluding alimony and child support, but including support of Michael ($123.85), are $457.68. Avram is fully capable of meeting the support of Garrie's needs.

Garrie's income, exclusive of support being received from Avram, is $127.00 per week. I find her weekly expense needs to be excessive, both as to rent (she has the ability to share with another person), telephone and automobile costs. I find her weekly expenses to be no greater than $500.000.

Avram's assets consist of the following:

1980 Honda Accord	$2,200.00
IBM pension	6,000.00
Household furnishings	1,000.00
Computer equipment	1,200.00
Hunting rifles	575.00
Bank account	1,330.00
Savings Account	300.00
For a total of	$13,105.00

Garrie's assets are as follows:

Household furnishings	1,000.00

She also has available to her a 1985 Honda Civic, which is in her mother's name, on which she is making the loan payments. The Civic is valued at $4,600.00.

The parties have joint assets as follows:

Cash settlement from marital home	$14,856.88
Anticipated income tax refund 1980 to 1984	14,000.00
Anticipated income tax refund 1985	8,446.00
Anticipated income tax refund 1986	7,000.00
Antique Samovar	700.00
Antique Oak table	675.00
Restaurant equipment	4,500.00
Total of joint assets	$49,175.88

Avram's liabilities are as follows:

Loan against the 401K	$3,000.00
Loan from Harvey Blitz	3,000.00

Estimated attorney's fees	15,000.00
Total liabilities of	$21,000.00
Garrie's liabilities are as follows:	
Automobile loan	$ 4,500.00
Visa loan	950.00
Personal loan	800.00
Telephone obligation	435.00
Mass. Eye and Ear	85.00
A reserved credit account	1,500.00
Total liabilities of	$ 6,770.00
Plus, attorney's fees and disbursements	25,314.51
Making a total of	$32,084.51
The parties joint liabilities are:	
Brand	$30,000.00
FHA	3,600.00
The Stone	1,600.00
The accountants	4,855.00
IBM Credit Union	650.00
Internal Revenue Service	7,500.00

Saddie Klavan	5,000.00
Making a total of	$53,205.00

The Court does not regard monies that were to be set aside for the children's education to be a legal obligation of the parties to the children. The parties' joint liabilities exceed their joint assets.

Garrie's opportunity to acquire additional assets is minimal due to the poor prospects for any meaningful employment.

Avram is capable of acquiring further assets because of his technical skills and his increased employment opportunities.

ANALYSIS

Avram's abandonment of Garrie in times of crisis and his insensitivity to her problems led to an irretrievable breakdown of the marriage. He was unable

to cope with financial difficulties and this lead to an insurmountable burden placed upon Garrie even while she was supportive of his attempts to become financially independent. His failure to support her also contributed to the family breakup despite her trying to keep the family going. While the children were growing up she had been the primary support of the family. Both parties are of working age and Avram's opportunities for future acquisition of assets and improving his employment status will continue. He has no health problems. On the other hand, Garrie's opportunities are minimal, as she had physical problems, her administrative abilities are questionable and her ability to acquire future assets, and indeed, to earn a reasonable income, is doubtful.

Garrie will need support and maintenance for the rest of her life.

The delicatessen venture on the whole was ill-conceived and foolishly entered into but was a joint venture and I find both parties should remain jointly liable for the debts of this venture.

In order for Garrie to meet her needs she must be maintained on Avram's medical plan and in addition must receive no less than $400.00 per week.

Insofar as the Motion for Counsel Fees incurred the Court is of the opinion that many of the problems involved in this case are due to intransitiveness on the part of Avram. The Court, taking into consideration the experience of both counsel and co-counsel of Garrie, will award Garrie for counsel fees the sum of $5,000.00 to be paid by Avram in or

within six (6) months from the date hereof.

ORDER

I. Judgment is to enter in Garrie Joan Klavan on the grounds of cruel and abusive treatment.

II. Avram is to pay Garrie $400.00 forthwith and $400.00 each and every week hereafter beginning on Friday, February 12th, 1988, by way of wage assignment.

III. The money in their escrow account of approximately $14,000.00 is to be forthwith assigned and turned over to Garrie.

IV. Each party shall retain the personal property (including automobiles) in their respective possession.

V. Each party will retain whatever cash, stock, pension accounts, bank accounts now standing in their respective names.

VI. The parties shall retain their joint interest on business assets and in all monies due to the Internal Revenue Service.

VII. Avram shall pay Garrie in or within six (6) months from the date hereof the sum of $5,000.00 as attorney's fees.

VIII. Avram shall maintain Garrie and the children on his medical health insurance coverage program so long as they are eligible without additional cost to them. He shall at all times keep Garrie covered to no less extent than she is presently covered and shall be responsible for payment of one-half of her reasonable uninsured medical, dental and hospital expenses upon receipt of validated invoices which shall be promptly rendered.

IX. Garrie shall remain or be reinstated as primary beneficiary of Avram's present life insurance policies. No encumbrances shall be put upon said insurance policies and Garrie shall be given such evidence, as may be reasonably required by her, of the policy remaining in full force and effect. The said Avram will advise the insurer to notify Garrie of any prior notice of cancellation.

DATED: February 10, 1988

/s/
Sumner Z. Kaplan, Justice
Probate & Family Court

89-1378

No. -

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1989

AVRAM MACY KLAVAN,
PETITIONER,

v.

GARRIE JOAN KLAVAN,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

May the Commonwealth of Massachusetts exercise personal jurisdiction over a non-resident who has been personally served with process while physically present within the Commonwealth?

Has the petitioner voluntarily submitted to the jurisdiction of the Massachusetts Probate and Family Court by actively and fully participating in discovery and trial?

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Constitutional Provisions

United States Constitution, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Decisions

Bateman v. *Wood*, 297 Mass. 483, 9 N.E.2d 375 (1937).

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462 (1985).

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Shaffer v. *Heitner*, 433 U.S. 186 (1977).

Statutes

Massachusetts General Laws c. 227, § 1

A personal action shall not be maintained against a person not an inhabitant of the commonwealth un-

> less he or his agent appointed under section five or five A has been served with process in the commonwealth, or unless service has been made upon him outside the commonwealth, as authorized by chapter two hundred and twenty-three A, or unless an effectual attachment of his property within the commonwealth has been made upon a writ of attachment and in case of such attachment without such service, the judgment shall be valid only to secure the application of the property so attached to the satisfaction of judgment.

Decisions Below

The opinions of the Supreme Judicial Court of Massachusetts, the oral ruling of the Massachusetts Probate and Family Court denying the motion to dismiss, and the final decision of the Probate and Family Court have been accurately set forth in the Appendices to the Petition for Writ of Certiorari except that the petitioner has failed to include the Massachusetts Probate and Family Court's Judgment of Divorce Nisi. This judgment is attached hereto (App. 24a). In addition, the petitioner has incorrectly stated that the decision of the Supreme Judicial Court of Massachusetts is unreported. In fact, this decision is reported as *Klavan* v. *Klavan*, 405 Mass. 1105, 544 N.E.2d 863 (1989).

Statement of the Facts

This case involves a divorce action between the respondent, Garrie Klavan (hereinafter "Wife"), a Massachusetts resident, and Avram Klavan (hereinafter "Husband"), an Alaska resident. After participating fully in discovery and attending a four day

trial, the Husband is seeking to overturn the judgment of the Massachusetts Probate and Family Court on the basis that the Court lacked personal jurisdiction over him.

The parties were married in the state of New York in 1966. For most of the duration of their marriage the parties lived in Vermont. In 1983, the Husband deserted the family and moved to Alaska (App. 2a). In order to support her two children, the Wife left Vermont in July of 1985 and moved to Massachusetts. During the Summer of 1986 the Husband and the Wife agreed to meet in Vermont to discuss divorce (App. 3a, 19a). During this same summer the Wife was compelled to seek emergency medical treatment on three separate occasions[1] (App. 42a). Because of her poor physical condition the Wife could not meet the Husband as planned in Vermont. Accordingly, the parties agreed to meet in Massachusetts as they had done before (App. 42a). On August 14, 1986 the Husband was served with a summons and complaint for divorce as he disembarked his plane at Logan Airport in Boston, Massachusetts.

On or about January 9, 1987, counsel for the Husband filed a special appearance "only for the purpose of filing a motion to dismiss." (App. 20a.) The Husband based this motion on the grounds that the Wife had obtained service upon the Husband by fraud and deceit. The Husband made no claim in his motion to dismiss that he lacked sufficient minimum contacts with Massachusetts to support the exercise of personal jurisdiction. On January 30, 1987, the Massachusetts Probate and Family Court denied the Husband's motion to dismiss.

[1] The Wife suffered serious, life-threatening, illnesses during the course of the marriage. In 1972 she had a gall bladder operation with a difficult recovery which resulted in continuing back pain and pain radiating down her right side. In the mid-1970's, Wife suffered Cushing's Syndrome with symptoms including a deepening of her voice, increased muscle mass and hirsuitism (see Appendix to Petition for Writ of Certiorari). In 1982, the Wife underwent surgery for the removal of a malignant adrenal tumor. The Wife has also suffered osteoporosis with resultant deterioration of the jaw bone and tooth loss (*id.*).

Following the denial of his motion to dismiss, the Husband participated fully in discovery — propounded and answered interrogatories, exchanged documents with the Wife and took the deposition of the Wife and the Wife's medical expert. On June 4, 1987, the parties appeared for trial before the Massachusetts Probate and Family Court. After one day of trial the Court declared a mistrial on the basis that, without conducting further diagnostic tests, the Wife's medical expert could not conclusively diagnose the Wife's current physical condition.

The parties returned to the Massachusetts Probate and Family Court and attended a four day trial on September 14, 15, 16, and 17, 1987. The Husband attended all four days of trial and testified as a witness on his own behalf. Counsel for the Husband cross-examined both the Wife and the Wife's medical expert. On February 10, 1981, the Court entered a Judgment of Divorce Nisi. This judgment provided, *inter alia*, that the Husband would pay the Wife weekly support payments.

The Husband then appealed the Judgment of Divorce Nisi again arguing that the Wife had fraudulently lured him into Massachusetts for the sole purpose of serving process on him. Since the Husband had been served with process while within Massachusetts, the Husband aptly pointed out in his brief that the Massachusetts long arm statute was inapplicable (App. 5a).

Prior to the case being heard on appeal the Husband and Wife received a refund from a previously-filed income tax return. Significantly, this refund was initially held in escrow but then was divided equally as per the provisions of the Judgment of Divorce Nisi.

The Massachusetts Supreme Judicial Court transferred the case to its own docket and heard oral argument. The Court found specifically that the Wife had not tricked the Husband into coming to Massachusetts and, therefore, the Massachusetts Probate and Family Court had jurisdiction over the Husband.

The Court did not address the question of whether the Husband had sufficient minimum contacts with Massachusetts to support the exercise of personal jurisdiction.

Reasons Why the Petition Should Not Be Granted

This case does not present an unresolved question of federal law that should be settled by this Court. The decision of the Massachusetts Probate and Family Court in denying the Husband's motion to dismiss is consistent with Mass. Gen. L. c. 227, § 1 and with prior decisions of this Court. Since the seminal case of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), this Court has consistently held that a state court can validly exercise jurisdiction over a non-resident defendant who has been served with process while within that state. *See, e.g., Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

None of the cases cited by the Husband involve a factual situation similar to this case in which a non-resident defendant is served in state and then participates fully in discovery and trial. The cases of *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); and *Hanson* v. *Denckla*, 357 U.S. 235 (1958) all involve the exercise of jurisdiction over a foreign corporation and consider the question of when it can be said that the corporation is "present" in the state so as to be amenable to in personam jurisdiction. A guiding principle in the Court's analysis of this issue has been that a state court's exercise of jurisdiction must be consistent with traditional notions of "fair play and substantial justice". *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-17 (1945). The standard enunciated by *International Shoe* and its progeny was intended to supplement rather than replace "presence" as a jurisdictional

basis. *New York* v. *O'Neill*, 359 U.S. 1 (1959); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

It should be noted that contrary to the Husband's assertions, this case does *not* present a question of whether a state court can validly exercise personal jurisdiction over a non-resident defendant "whose sole contact with the state was a single visit during which he was served with process." (Petition for Writ of Certiorari, p. I.) The question of whether the Husband had sufficient minimum contacts with Massachusetts is raised for the first time in this appeal. This issue was *not* raised in the Husband's initial motion to dismiss, was not briefed by counsel, and was not addressed by the Massachusetts Supreme Judicial Court.[2] Consequently, this Court is not warranted in reviewing the Massachusetts Supreme Judicial Court's decision on the grounds asserted by the Husband. *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239 (1983); *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

[2] The issue before the Massachusetts Supreme Judicial Court was much narrower than that advanced by the Husband; namely, did the Massachusetts Probate and Family Court obtain valid personal jurisdiction over the Husband in light of the manner of service of process (App. 1a-9a). The Massachusetts Probate and Family Court and the Massachusetts Supreme Judicial Court both ruled that, since the Husband had not established that the Wife had fraudulently lured him into the Commonwealth for the purpose of serving process, service of process was valid, and the Massachusetts Probate and Family Court obtained personal jurisdiction over the defendant. More particularly, the issue before the Massachusetts Supreme Judicial Court was whether the Massachusetts Probate and Family Court was warranted in denying the Husband's motion to dismiss on the evidence presented (App. 1a-9a). The Husband argued on appeal that the trial court should have allowed the motion to dismiss since the Wife did not file a counteraffidavit or otherwise submit evidence refuting the allegations set forth in the Husband's affidavit. The Massachusetts Supreme Judicial Court disagreed with this argument.

The Husband Has Voluntarily Submitted to the Jurisdiction of the Massachusetts Probate and Family Court

Counsel for the Husband initially filed a special appearance solely for the purpose of filing a motion to dismiss (App. 20a). After this motion to dismiss was denied, the Husband participated fully in discovery and attended trial. Under Massachusetts law "one, adopting the form of special appearance in order not to submit to the jurisdiction of the court, brings himself within the jurisdiction by seeking relief in matters beyond the narrow field covered by the special appearance." *Leffler* v. *Todd*, 316 Mass. 227, 232, 55 N.E.2d 767 (1944). *See also Bateman* v. *Wood*, 297 Mass. 483, 486, 9 N.E.2d 375 (1937) ("A party may lose the right to object to lack of proper service of process by general appearance or by pleading to the merits."). In this case the Husband has certainly exceeded the scope of the special appearance. The Husband engaged in discovery, attended trial and, subsequent to trial, relied on the Judgment of Divorce Nisi to distribute an IRS refund. By these actions the Husband has implicitly submitted to the jurisdiction of the Massachusetts Probate and Family Court. If the Husband sincerely thought that the Massachusetts Probate and Family Court lacked jurisdiction, then the Husband need not have participated in discovery and trial. Alternatively, the Husband could have requested a stay of proceedings in order to allow him to appeal the jurisdictional issue. The Husband's voluntary and active participation in this case signals his implicit acceptance of the Massachusetts Probate and Family Court's jurisdiction. By travelling from Alaska to Massachusetts to stand trial, the Husband has "purposefully availed [himself] of the privilege of conducting activities within" Massachusetts. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

Granting the Petition Places an Unreasonable Burden on the Wife

If this Court were to find that the Massachusetts Probate and Family Court lacked jurisdiction, then the Wife would have no alternative but to initiate divorce proceedings in a forum in which the Husband is "present." At present, the only available forum for the Wife to obtain relief would be Alaska. (Vermont does not have jurisdiction since neither of the parties are residents.) (App. 45a.) The Husband is mindful of this fact and is using his jurisdictional challenge as an attempt to compel the Wife to accept a drastically modified settlement. To force the Wife to travel to Alaska to pursue a duplicate divorce action would place an unreasonable burden on her especially given her poor physical and financial condition. By challenging the jurisdiction of the Massachusetts Probate and Family Court at this late date, the Husband is attempting to engage in the type of forum shopping which is antithetical to due process. There can be no doubt that if the Husband has obtained a judgment in the Massachusetts Probate and Family Court more to his liking, then he would not have filed an appeal. The Husband is attempting to take two bites of the apple.

This Case is Significantly Different from *Burnham* v. *California Superior Court*

This case can easily be distinguished from *Burnham* v. *California Superior Court*, No. 89-44. In *Burnham*, after the Husband (a New Jersey resident) was served with process while visiting his Wife and children in California, he moved to stay those proceedings pending a jurisdictional appeal. Thus, while both cases involve challenges to jurisdiction in situations

where the defendants were served in state, the two cases stand on significantly different footings. First, the issue of minimum contacts is clearly the penultimate issue in *Burnham*. In *Burnham* both parties have thoroughly and cogently briefed this issue. In the instant case, however, since the issue of minimum contacts was not raised by the Husband in his motion to dismiss and was not at issue before the Massachusetts Supreme Judicial Court, this Court does not have authority (or sufficient information) to address this issue. Second, the interests of the parties are significantly different since the parties in this case have already invested substantial time and money in a trial. In *Burnham* the question is whether "fair play and substantial Justice" is better served by having a trial in California or in New Jersey. In this regard the parties in *Burnham* stand on equal footing. In the instant case, however, the question is whether "fair play and substantial justice" is served by compelling the parties to retry the case in Alaska. Such a retrial would place an unreasonable and disproportionate burden on the Wife.

Conclusion.

For all the reasons set forth herein and based upon all of the foregoing authorities, the Wife respectfully requests that this Court deny the Husband's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX.

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 88-P-1046.

NORFOLK COUNTY.

GARRIE JOAN KLAVAN,
APPELLEE,

v.

AVRAM MACY KLAVAN,
APPELLANT.

ON APPEAL FROM JUDGMENT ENTERED IN
THE PROBATE AND FAMILY COURT DEPARTMENT
OF THE TRIAL COURT, NORFOLK COUNTY.

Appellant's Brief.

Statement of the Issue.

Whether the Judgment of Divorce Nisi is void because of lack of jurisdiction over the defendant.

Statement of the Case.

On August 13, 1986, the plaintiff, Garrie Joan Klavan (Garrie), filed a complaint for divorce in the Norfolk Probate and Family Court against the defendant Avram Macy Klavan (Avram) alleging cruel and abusive treatment and irretrievable breakdown of the marriage (A. at 8). Avram filed a motion to dismiss the complaint, supported by affidavit, on the grounds that Garrie had obtained invalid service upon him through fraud and deceit by deceiving him into coming to Massachusetts solely for the purpose of obtaining service upon him (A. at 13-14). Avram's attorney also filed a special appearance for the purpose of presenting the motion to dismiss (A. at 18). A hearing on the motion to dismiss took place without an evidentiary hearing on January 30, 1987 (A. at 21, 24). The Court (Farrell J.) denied the motion to dismiss from the bench (A. at 21, 24). The action was tried on September 14, 15, 16, 17, 1987 (A. at 1). A Judgment of Divorce Nisi entered on February 10, 1988 (App. at 22). Avram filed a timely notice of appeal on March 9, 1988 (A. at 5).

Facts.[1]

Garrie and Avram were married at Monsey, New York on May 29, 1966 (A. at 8, 15). From 1972 through 1983 they resided in Essex Junction, Vermont (A. at 15-16). Marital difficulties arose in 1981-82 (A. at 16). Due to financial problems and the need to obtain increased funds, Avram left Vermont in the summer of 1983 to live and work in Alaska (A.

[1] All facts here presented are derived solely from the complaint, Avram's affidavit in support of his motion to dismiss, the docket and transcript of the hearing on the motion to dismiss.

at 16). Garrie and the two children of the marriage remained in Vermont until January 1985 when Garrie came to Alaska in an effort to reconcile (A. at 16). In March 1985 Avram travelled to Vermont, remaining there two weeks in an attempt to reconcile (A. at 16).

In July or August of 1985, Garrie moved to Massachusetts (A. at 16). Despite renting the Vermont marital home for $700 a month, Garrie failed to pay the monthly mortgage of $133 resulting in foreclosure proceedings (A. at 16).

On August 6, 1986, Avram arrived in New York to visit his mother (A. at 17). He had planned then to go to Vermont to meet Garrie and finalize litigation relating to the foreclosure proceedings and divorce (A. at 17). Upon his arrival in New York, Avram spoke to Garrie by telephone (A. at 17). Garrie refused to meet Avram in Vermont and demanded he come to Boston (A. at 17). Garrie became hysterical and screamed that he had come to Boston so they could talk (A. at 17). Garrie made no mention of a divorce in Massachusetts (A. at 17). Avram acquiesced to Garrie's request (A. at 17). Upon disembarking from the plane at Logan Airport in Boston, Avram was served by a constable with the Summons and Complaint in this action (A. at 12, 17) which was the only method of service ever undertaken to serve the complaint upon him (A. at 1-7).

Avram filed a motion to dismiss the complaint, in lieu thereof, to quash the return of service on the grounds that Garrie fraudulently deceived Avram into coming to Massachusetts only for the purpose of obtaining service upon him (A. at 13). Avram's attorney filed a special appearance solely for the purpose of contesting jurisdiction (A. at 18). Avram also submitted an affidavit in support of the motion to dismiss and motion to waive the requirement he attend the hearing on the motion to dismiss (A. at 15-20).

Garrie's complaint for divorce alleged she resided in Brookline, Norfolk County, and that Avram resided in Anchorage,

Alaska (A. at 8). She further alleged they last lived together in South Burlington, Vermont in August 1983, and that the grounds for the complaint occurred in Vermont on or about August 1983 (A. at 8).

On January 30, 1987, a hearing on Avram's motion to dismiss took place in the Norfolk Probate and Family Court. No oral testimony nor any evidence other than Avram's affidavit was presented to the Court (A. at 15-17, 24-29). Garrie did not offer a counter-affidavit and did not testify although she was present and spoke on other matters at the hearing (A. at 26-28). The Court (Farrell, J.) indicated to counsel that he had their written submissions and offered each the opportunity to argue, which each declined (A. at 24). Whereupon, the Court, without further comment or finding, ruled from the bench denying the motion to dismiss (A. at 24).

Argument.

THE JUDGMENT OF DIVORCE NISI IS VOID BECAUSE THE PROBATE AND FAMILY COURT LACKED PERSONAL JURISDICTION OVER THE DEFENDANT WHERE SERVICE WAS ACCOMPLISHED BY FRAUD AND DECEIT.

A valid judgment imposing a personal obligation or duty in favor of a plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *Kulko* v. *Superior Court of California, Etc.*, 436 U.S. 84, 91 (1978); *Pennoyer* v. *Neff*, 95 U.S. 714, 732-733 (1878). Personal jurisdiction depends upon the presence of notice to the defendant and a sufficient connection based upon minimum contacts between the defendant and the forum State to require a defense of the action in the forum State. *Kulko, supra*, 436 U.S. at 91-92.

The Massachusetts Probate and Family Court may exercise divorce jurisdiction based solely upon the domicile of the plaintiff, even if the defendant neither appears nor is personally served.[2] *Fiorentino* v. *Probate Court*, 365 Mass. 13, 17, 310 N.E.2d 112, 116 (1974); G.L. c. 208, Section 5. The plaintiff, nevertheless, must still show that service was made by one of the methods authorized by Mass. R. Dom. Rel. Pro. 4. See Mass. R. Dom. Rel. Pro. 4, Reporter's Notes, (unless defendant not amenable to service, absent valid in-hand service upon defendant, substitute service may only be obtained upon order of the Court by filing motion for service by publication and mailing); see generally *Wiley* v. *Wiley*, 328 Mass. 348, 349, 103 N.E.2d 699, 700 (1952) (upon substituted service court has jurisdiction to order modification of the incidents of the status of marriage). In order to divide marital assets and award alimony, however, the Probate and Family Court must have personal jurisdiction over the defendant, and the plaintiff must, without exception, make personal service upon the defendant. *Schmidt* v. *Schmidt*, 280 Mass. 216, 219-221, 182 N.E. 374, 376 (1932).[3]

Faced with a motion to dismiss for lack of personal jurisdiction over the defendant, the plaintiff bears the burden of establishing sufficient facts on which to predicate jurisdiction over the defendant. *Good Hope Industries, Inc.* v. *Ryder Scott Co.*,

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[2] Jurisdiction under the long-arm statute, G.L. c. 223A, Section 3 is not applicable in this action. The parties did not maintain a marital domicile in Massachusetts at any time (G.L. c. 223A, Section 3(g)) and nothing in the record suggests Avram ever transacted any business in Massachusetts (except for the day he was served with process) to warrant a finding that he had sufficient minimum contacts with Massachusetts to assert jurisdiction under G.L. c. 233A, Section 3(a). See *Morrill* v. *Tong*, 390 Mass. 120, 129-134, 453 N.E.2d 1221, 1227-1229 (1983) (finding lack of sufficient minimum contacts to assert personal jurisdiction under G.L. c. 223A, Section 3(a)).

[3] The same requirement of personal jurisdiction and personal service applies to support orders issued pursuant to G.L. c. 209, Section 32. *Katz* v. *Katz*, 330 Mass. 635, 639, 116 N.E.2d 273, 276 (1953); *Wiley* v. *Wiley*, 328 Mass. 348, 349, 103 N.E.2d 273, 276 (1952).

378 Mass. 1, 3, 389 N.E.2d 76, 78 (1979). The plaintiff may not rely on the bare pleadings to withstand a motion to dismiss based upon lack of personal jurisdiction, but rather, must respond with actual proof and not mere allegations, since the plaintiff bears the burden of proof to establish jurisdiction. *Time Share Vacation Club* v. *Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984); see *Alden Transportation Co., Inc.* v. *Bloom*, 11 Mass. App. 920, 920, 415 N.E.2d 250, 250-251 (1981) (summary judgment entered in favor of moving party where opposing party did not file counter affidavit and based opposition solely upon allegations contained in verified complaint; *Noyes* v. *Quincy Mutual Fire Ins. Co.*, 7 Mass. App. 723, 725-726, 389 N.E.2d 1046, 1048 (1979) (faced with motion for summary judgment opposing party may not rest on pleadings, but must allege specific facts which establish triable issue).

Avram's attorney specially appeared to contest jurisdiction and submitted Avram's affidavit alleging specific facts that the Probate and Family Court lacked jurisdiction. Garrie, however, failed to meet her burden of proof as she not submit a counter-affidavit, testimony or other admissible evidence in opposing the motion to dismiss.[4] For purposes of ruling on the motion to dismiss, therefore, all the allegations contained in Avram's affidavit must be accepted as being true. See *U.S. Fidelity and Guaranty Company* v. *N.J.B. Prime Investors*, 6

[4]Garrie did submit a brief in opposition to the motion to dismiss. Briefs, however, are not sources of evidence that the Court may consider on a motion to dismiss. *Harry Winston, Inc.* v. *Waldfogel*, 292 F. Supp. 473, 476 (S.D.N.Y. 1968); see *Collins* v. *Keefe*, 332 Mass. 375, 379, 124 N.E.2d 910 (1955) (Court cannot accept as evidence statements of counsel appearing only in briefs and not shown to be supported by the record); *Peluso* v. *Peluso*, 5 Mass. App. 906, 906, 370 N.E.2d 723, 723 (1977) (Appeals Court will not consider "facts" appearing in affidavit appended to appellate brief and set forth in appellate brief as "facts" occurring in lower court proceeding where affidavit not part of the record). Garrie also did not testify at the hearing on the motion to dismiss although she was present and addressed the Court on other matters.

Mass. App. 455, 456 n.3, 377 N.E.2d 440, 441 n.3 (1978); Mass. R. Civ. P. 56(e).

Avram's affidavit established he had been a resident of Alaska since August 1983 and prior to that he had lived with Garrie in Vermont as husband and wife from 1972 through 1983. When Avram telephoned Garrie in August 1986 asking her to meet him in Vermont to discuss settlement of litigation relating to the marital home in Vermont and possible divorce proceedings, she refused to go to Vermont. When Avram said he would not come to Boston, Garrie became hysterical and screamed that Avram had to come to Boston so they could talk. No mention was made of bringing divorce proceedings in Massachusetts. Avram told Garrie of his airplane arrangements and upon his arrival in Boston he was served with the summons and complaint as he left the plane.

Under the facts before the Court, which were uncontroverted by any evidence offered by Garrie, the Probate and Family Court erred in denying Avram's motion to quash service and to dismiss the complaint. It is a long established principal of law that when

> a person is induced by the artifice or fraud to come within the jurisdiction of the Court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon a proper showing.

Commercial Mutual Accident Company v. *Davis*, 213 U.S. 245, 246 (1909); see generally 98 A.L.R. 2d 551 and cases cited at 556-558 (1964).[5] Other courts have invoked this prin-

[5] Apparently, no reported Massachusetts cases have addressed this issue. Two Massachusetts Federal District Court cases, however, recognize this principal. See *Willametz* v. *Susi*, 54 F.R.D. 463, 463 (D. Mass. 1972) (false representations used to entice defendant into district constitute abuse of process

cipal in situations where, as here, the plaintiff asks the defendant to come to the jurisdiction, ostensibly to discuss settlement of a dispute, without revealing that upon entering the jurisdiction the plaintiff will serve process upon the defendant. E.g., *Coyne* v. *Grupo Industrial Trieme, S.A.*, 105 F.R.D. 627, 630 (D. D.C. 1985); *E/M Lubricants, Inc.* v. *Microfral, S.A.R.L.*, 91 F.R.D. 235, 237 (N.D. Ind. E.D. 1981); *Oliver* v. *Cruson*, 153 F. Supp. 74, 78 (D. Mont. 1957). The same rule against service by trick has been applied in the context of divorce proceedings. *Heston* v. *Heston*, 52 N.J. Eg. 91, 91-92, 28 A. 8, 8 (1873); see *Zenker* v. *Zenker*, 161 Neb. 200, 204-216, 72 N.W.2d 809, 816-819 (1955) (defendant induced to travel to Colorado on representation his presence was required to effectuate conveyance of real estate and served with process for divorce upon arrival).

Garrie's duplicity and intent in luring Avram into Massachusetts is readily apparent. Garrie never mentioned that she was filing for divorce in Massachusetts. She had a constable waiting at the airport to make service as soon as Avram stepped off the plane. Under these circumstances courts have found that the plaintiff's real purpose was not to conduct settlement discussions, but rather, was to serve the defendant with process, and accordingly, have quashed the service of process. *Coyne, supra*, 105 F.R.D. at 629; *Sunshine Kitchens, Inc.* v. *Alanthus Corp.*, 65 F.R.D. 4, 5 (S.D. Fla. 1974).

Avram had no reason to set foot in Massachusetts other than to speak to Garrie at her request. There is a strong presumption in favor of quashing service under these circumstances whenever a defendant travels to the jurisdiction for settlement talks at the plaintiff's behest and the plaintiff does not unequivocally tell the defendant before the trip that the defendant will be served. *Coyne, supra*, 105 F.R.D. at 630.

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requiring process to be set aside); *Union Sugar Refinery* v. *Mathieson*, 2 Cliff 304, F. Cas. No. 14392, 24 Fed. Cas. 680, 681 (1864) (recognizing principal).

The uncontroverted facts contained in Avram's affidavit establish that in this case the Probate and Family Court erred in denying the motion to dismiss. Avram was a non-resident who was induced through false pretenses to enter Massachusetts solely for Garrie to make service of process upon him. Absent valid personal service, the Probate and Family Court lacked personal jurisdiction to order a division of assets under General Law chapter 208, Section 34. *Schmidt, supra*, 280 Mass. at 219-221, 182 N.E. at 376; see *Wyman* v. *Newhouse*, 93 F.2d 313, 315 (2d Cir. 1937) (judgment attacked for fraud goes to personal jurisdiction of Court over defendant, judgment procured fraudulently lacks jurisdiction and is null and void). As the record fails to disclose that any other form of service was made upon Avram, the entire Judgment of Divorce Nisi entered pursuant to General Law Chapter 208, Section 5 is also void due to lack of service of process.

Conclusion.

The Court should reverse the decision of the Probate and Family Court denying the defendant's motion to dismiss, quash service of process on the grounds that service was procured by fraud and annul the Judgment of Divorce Nisi entered on February 10, 1988, on the basis of lack of personal jurisdiction and failure to make service of process.

Respectfully submitted,

AVRAM KLAVAN
By his attorneys,
KASSLER AND FEUER
ALAN S. GEISMER, JR.
MARK RODER
85 Devonshire Street
Boston, MA 02109
(617) 227-4800

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 88-P-1046.

NORFOLK COUNTY.

GARRIE JOAN KLAVAN,
APPELLEE,

v.

AVRAM MACY KLAVAN,
APPELLANT.

ON APPEAL FROM JUDGMENT ENTERED IN
THE PROBATE AND FAMILY COURT DEPARTMENT
OF THE TRIAL COURT, NORFOLK COUNTY.

APPENDIX.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. 86D-1093-D1

COMPLAINT FOR DIVORCE

GARRIE JOAN KLAVAN, Plaintiff

v.

AVRAM MACY KLAVAN, Defendant

1. Plaintiff, who resides at 20 Stearns Road, Brookline, County of Norfolk was lawfully married to the defendant who now resides at 9701 Vanguard Drive, Anchorage, Alaska.
2. The parties were married at Monsey, New York on May 29, 1966 and last lived together at South Burlington, VT on August, 1983.
3. The minor children of this marriage, and date(s) of birth - is - are:
   Arni Joyce; Sept. 30, 1967
   Michael Eric; Nov. 10, 1969
4. Plaintiff certifies that no previous action for divorce, annulling or affirming marriage, separate support, desertion, living apart for justifiable cause, or custody of children has been brought by either party against the other _____
5. On or about August, 198 3, the defendant was cruel and abusive to the plaintiff by acts of mental cruelty on diverse dates and the divergent goals of the parties resulted in an irretrievable breakdown of the marriage.
6. Wherefore, plaintiff requests that the Court:
   - ☒ waive the 30-day requirement for filing this complaint
   - ☒ grant a divorce for cruel and abusive treatment and irretrievable breakdown.
   - ☐ prohibit defendant from imposing any restraint on plaintiff's personal liberty
   - ☒ grant her custody of the above-named children
   - ☒ order a suitable amount for support of the plaintiff and said minor children
   - ☐ order conveyance of the real estate located at _____ _____ standing in the name of _____ _____ as recorded with _____ Registry of Deeds, Bk. _____ Pg. _____
   - ☐ allow plaintiff to resume her former name of _____
   - ☒ order a division of the assets under M.G.L. c. 208, § 34

Dated: August 8, 1986 /s/ Peter F. Zupcofska
Signature of Attorney

Plaintiff's Signature, if Pro Se

Margot Ames Clower
Burns & Levinson
50 Milk Street
Boston, MA 02109
Print name and address

COMMONWEALTH OF MASSACHUSETTS

NORFOLK DIVISION PROBATE AND FAMILY COURT
DOCKET NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

vs.

AVRAM MACY KLAVAN,
Defendant

MOTION TO WAIVE THE
NECESSITY OF IDENTIFYING WITNESS

Now comes Garrie Joan Klavan, plaintiff in the above-captioned case, and requests that this Honorable Court waive the necessity of an identifying witness in effectuating service of the Summons on her Complaint for Divorce.

In support of her motion, the plaintiff states that there are no unrelated third parties available in the Commonwealth of Massachusetts to serve as an identifying witness. The defendant has been living in Alaska since the parties' separation three years ago. The constable and/or deputy sheriff effectuating service of said Complaint can be provided with an adequate description and photograph to ensure positive identification of the defendant in this Complaint.

WHEREFORE, the plaintiff requests that this Honorable Court waive the necessity of an identifying witness upon effectuating service of her Complaint for Divorce.

Respectfully submitted,

PETER F. ZUPCOFSKA
MARGOT AMES CLOVER
BURNS & LEVINSON
50 Milk Street
Boston, Massachusetts 02109
(617) 451-3300

Dated: 8 August, 1986

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. 86D-1093-D1

DOMESTIC RELATIONS SUMMONS

Garrie Joan Klavan, Plaintiff

v.

Avram Macy Klavan, Defendant

To the above-named Defendant:

You are hereby summoned and required to serve upon Peter F. Zupcofska plaintiff's attorney whose address is BURNS & LEVINSON, 50 Milk Street, Boston, MA 02109 a copy of your answer to the complaint for Divorce which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, the Court will proceed to the hearing and adjudication of this action. You are also required to file your answer to the complaint in the office of the Register of this Court at Dedham either before service upon plaintiff's attorney or within a reasonable time thereafter.

Witness ROBERT M. FORD Esquire, First Justice of said Court at Dedham.

August 13, 198 6

_____
Register of Probate

ACCEPTANCE OF SERVICE

I, _____, the above-named Defendant hereby accept service of this summons and understand that judgment may be rendered against me in accordance with the complaint a copy of which I have received this day.

_____ _____
Signature of Defendant

_____ Division Date: _____

Then personally appeared the above-named _____ who made oath that the foregoing acceptance was his free act and deed.

Signature of Notary Public _____

Print Name _____

My Commission Expires: _____

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. _____

PROOF OF SERVICE

I hereby certify and return that on August 14, , 198 86 , I served a copy of the within summons, together with a copy of the complaint in this action upon the within-named defendant in the following manner, — *by giving in hand to the within-named defendant; Avram Macy Klavan. Said service was made at Logan International Airport, Piedmont Airlines, Flight #1382, East Boston, Massachusetts. *SERVED WITH MOTION TO WAIVE THE NECESSITY OF IDENTIFYING WITNESS IN THE PRESENCE OF* N.A. *of* _____ who identified said defendant (italics applicable to Divorce Complaint only).

August 14, 1986 Signed under the pains and penalties of perjury.

Date

August 14, 1986 /s/ Bernard Witten

Date of Service Signature of officer or other server

AFFIDAVIT OF IDENTIFYING WITNESS
(APPLICABLE IN DIVORCE ACTION ONLY)

I, _____, of _____ hereby certify that I personally know the defendant named herein, that the defendant is the spouse of the plaintiff and was served with a copy of this summons together with a copy of complaint for divorce in my presence on _____, 198____, at (street & number) (city or town) (state).

Signed under the pains and penalties of perjury.

_____

PROOF OF SERVICE OF DISINTERESTED SERVER WHO IS ALSO IDENTIFYING WITNESS (APPLICABLE IN DIVORCE ACTIONS ONLY)

I, _____, of _____
hereby certify that I personally know the defendant named herein, that the defendant is the spouse of the plaintiff and was served by me with a copy of this summons together with a copy of complaint for divorce on _____, 198_____
at _____
(street and number) (city or town) (state)

Signed under the pains and penalties of perjury.

Note: The signature of the defendant must be notarized by a disinterested notary or justice of the peace who is neither associated in business with nor employed by the plaintiff or his attorney.

Note: Service of process must comply with Massachusetts Rules of Domestic Relations Procedure Rule 4.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

TRIAL COURT
PROBATE & FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

MOTION TO DISMISS

AVRAM MACY KLAVAN,
Defendant.

NOW COMES the Defendant, Avram Macy Klavan, and moves that this Honorable Court:

1. Dismiss the above-captioned matter or in lieu thereof, to quash the return of service and as reason therefor states that the Plaintiff obtained service upon him by fraud and deceit in that she deceived him into appearing in the Commonwealth of Massachusetts solely for the purpose of obtaining service upon him, all as more fully set forth in the Defendant's Affidavit attached hereto and made a part hereof as Exhibit A.

2. Dismiss the motion as it is more properly brought in the State of Vermont and as reason therefor states that the Plaintiff and Defendant never lived as Husband and Wife in the Commonwealth of Massachusetts and that substantial relevant evidence concerning the marital relationship can be provided by witnesses who reside in the State of Vermont.

By his attorney,

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

January 9, 1987

CERTIFICATE OF SERVICE

I, Paul M. Kane, counsel for the Defendant, hereby certify that I served a copy of the within Motion to Dismiss upon the Plaintiff by delivering same, in hand, to Margot Clower, Attorney at Law, Plaintiff's counsel of record, at Burns and Levinson, 50 Milk Street, Boston, MA, 02109 together with notice that same motion is marked for hearing at Norfolk Probate and Family Court in Dedham on Tuesday, January 13, 1987.

Signed under the pains and penalties of perjury.

January 9, 1987 Paul M. Kane

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY COURT
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

AVRAM MACY KLAVAN,
Defendant

AFFIDAVIT OF DEFENDANT,
AVRAM MACY KLAVAN

NOW COMES the Defendant, Avram Macy Klavan, who on oath deposes and says:

1. My name is Avram Macy Klavan, and I live in Anchorage, Alaska, where I have resided since August, 1983.

2. Garrie Joan Klavan and I were married in Monsey, New York, on May 29, 1966.

3. There are two children born of the marriage. Their names and dates of birth are:

Arni Joyce Klavan, born September 30, 1967
Michael Eric Klavan, born November 10, 1969

Arni is currently a student at Bar Elan in Ramat Gan, Israel. Michael resides with his grandmother in Plantation, Florida.

4. From January, 1970, until November, 1982, I was employed as a technical associate engineer with International Business Machines, located in Essex Junction, Vermont. During 1978-79, my wife operated a court reporting business. We owned a restaurant beginning September/October, 1981 and another restaurant during 1983.

5. Severe marital problems surfaced in 1981/82.

6. During the summer of 1983, we suffered from financial problems and after discussions concerning the need for increased funds, I left for Alaska.

Prior to my departure, I executed a general power of appointment naming my wife as my attorney in full.

I am informed and therefore believe that within two days of my leaving for Alaska, my wife ceased operating the restaurant.

7. My wife and children remained in Vermont until January, 1985, when, in an effort to reconcile, she came to Alaska for approximately two weeks. During this period, my wife and I looked for property and my wife submitted resumes to potential employers.

8. In March, 1985, I travelled to Vermont and remained there for approximately two to three weeks, again in an effort to seek a reconciliation.

9. In July or August, 1985, my wife moved to Massachusetts. I am informed and therefore believe that my wife rented our Vermont home for approximately $700 per month. However, she paid the mortgage of $133.00 per month for only a few months. As a result of her failure to pay the mortgage, foreclosure proceedings were instituted.

10. In July, 1986, I decided to travel to New York to visit my ailing mother. I planned to meet my wife in Vermont in order to finalize litigation involving the former marital residence and restaurant and to complete divorce proceedings.

11. I arrived in New York on or about August 6, 1986. In a telephone conversation, my wife advised me that she would not come to Vermont but inquired whether I would instead come to Boston. When I stated that I would not, she became hysterical and screamed that I had to come to Boston so that we could talk. No mention was made of divorce.

I acquiesced and subsequently advised her of my plane reservations.

Upon debarking from the plane in Boston, I was served with a Complaint for Divorce and a summons.

Sworn to under the pains and penalties of perjury.

Date: _____

Avram M. Klavan

SUBSCRIBED AND SWORN TO BEFORE me this 19th day of November, 1986.

/s/ Susie Bell

Notary Public for Alaska

My commission expires: 11/18/88

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

SPECIAL APPEARANCE

AVRAM MACY KLAVAN,
Defendant

NOW COMES Paul M. Kane, Esquire, and files a special appearance only for the purpose of filing a motion to dismiss the above-captioned matter.

By his attorney,

January 9, 1987

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

CERTIFICATE OF SERVICE

I, Paul M. Kane, counsel for the Defendant, hereby certify that I served a copy of the within Appearance to Contest Service upon the Plaintiff by delivering same, in hand, to Margot Clower, Attorney at Law, at Burns and Levinson, 50 Milk Street, Boston, Massachusetts 02109.

Signed under the pains and penalties of perjury.

January 9, 1987

/s/ _____
Paul M. Kane

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

AVRAM MACY KLAVAN,
Defendant

MOTION TO WAIVE REQUIREMENT THAT DEFENDANT ATTEND HEARING

NOW COMES the Defendant, Avram Macy Klavan, and moves that this Honorable Court waive the requirement that he attend the hearing scheduled for January 30, 1987, and as reason therefor states:

(1) That he resides in Anchorage, Alaska;

(2) That the cost of the trip will be approximately $1,600, including lodging;

(3) That the Defendant has filed an Affidavit which presents the substance of his testimony.

By his attorney,

January 27, 1987

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

CERTIFICATE OF SERVICE

I, Paul M. Kane, counsel for the Defendant, hereby certify that I served a copy of the within Motion to Waive Requirement that Defendant Attend Hearing by delivering same, in hand, to Margot Clower, Attorney at Law, Plaintiff's counsel of record, at Burns and Levinson, 50 Milk Street, Boston, Massachusetts, together with notice that same action is marked for hearing at 10:00 a.m. on Friday, January 30, 1987, at Norfolk Probate and Family Court in Dedham.

Signed under the pains and penalties of perjury.

By his attorney,

January 27, 1987

_____

Paul M. Kane
McGrath and Kane
Four Longfellow Place
Boston, MA 02114
(617) 523-5600

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

TRIAL COURT
PROBATE AND FAMILY DEPT.
NO. 86D-1093-D1

GARRIE JOAN KLAVAN,
Plaintiff

v.

MOTION TO DISMISS

AVRAM MACY KLAVAN,
Defendant

NOW COMES the Defendant, Avram Macy Klavan, and moves that this Honorable Court:

1. Dismiss the above-captioned matter or in lieu thereof, to quash the return of service and as reason therefor states that the Plaintiff obtained service upon him by fraud and deceit in that she deceived him into appearing in the Commonwealth of Massachusetts solely for the purpose of obtaining service upon him, all as more fully set forth in the Defendant's Affidavit attached hereto and made a part hereof as Exhibit A.

2. Dismiss the motion as it is more properly brought in the State of Vermont and as reason therefor states that the Plaintiff and Defendant never lived as Husband and Wife in the

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION Docket No. 86D-1093-D11

JUDGMENT OF DIVORCE NISI

Garrie Joan Klavan, Plaintiff
of _____
v.
AVRAM MACY KLAVAN, Defendant
of _____

All persons interested having been notified in accordance with law and after hearing it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of cruel and abusive treatment as provided by Chapter 208, §§ 1-2 and that upon and after the expiration of ninety (90) days from the entry of this judgment it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order, and it is further ordered that the defendant is to pay the plaintiff the sum of Four Hundred and 00/100 ($400.00) Dollars forthwith and the further sum of Four Hundred and 00/100 ($400.00) Dollars on each and every week hereafter beginning on Friday, February 12th, 1988, by way of wage assignment. The money in plaintifff and defendant's escrow account of approximately $14,000.00 is to be forthwith assigned and turned over to the plaintiff. Each party shall retain the personal property (including automobiles) in their respective possession. Each party will retain whatever cash, stock, pension accounts, bank accounts now standing in their respective names. The parties shall retain their joint interest in business assets and in all monies due to the Internal Revenue Service. The defendant shall pay the plaintiff in or within six (6) months from the

date hereof the sum of $5,000.00 as attorney's fees. The defendant shall maintain the plaintiff and the children on his medical health insurance coverage program so long as they are eligible without additional cost to them. He shall at all times keep the plaintiff covered to no less extent than she is presently covered and shall be responsible for payment of one-half of her reasonable uninsured medical, dental and hospital expenses upon receipt of validated invoices which shall be promptly rendered. The plaintiff shall remain or be reinstated as primary beneficiary of the defendant's present life insurance policies. No encumbrances shall be put upon said insurance policies and the plaintiff shall be given such evidence, as may be reasonably required by her, of the policy remaining in full force and effect. The defendant will advise the insurer to notify the plaintiff of any prior notice of cancellation.

Feb. 10, 1988
Date

Justice of the Probate
and Family Court

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

Probate Court
Dedham Division
No. 86D-1093-D1

Klavan

vs.

Klavan

Atty. for Garrie Klavan: Peter Zupcofska, Esq.

Atty. for Avram Klavan: Paul M. Kane, Esq.
McGrath and Kane
4 Longfellow Place
Boston, MA 02114
(617) 523-5600

Judge
On the Motion to Dismiss, I have in fact read the Motion and both submissions. . . .

Atty.
Then I will rest on the Motions and the affidavit.

Judge
I will be happy to hear your argument if you wish to, if you want to say anything further on it.

Atty.
No, I think that's all set out there and the Court has indicated that it has read the appropriate pleadings.

Judge
Well, I am going to deny the Motion to Dismiss. Now, there's a Motion for a financial statement. Is your client with you today?

Atty. for Mr. Klavan
No, he is not, Your Honor.

Judge
Where is he?

Atty. for Mr. Klavan
He's in Alaska. When we received notice . . . originally this was marked it was a Motion and as soon as we received notice that they wanted a Hearing I filed a Motion to preclude his attendance. I also, when Mr. Gregory indicated to me that he wanted to, if the Court denied my Motion, he wanted to proceed on the support issues. I immediately sent out the materials to my client. He spends approximately two weeks a month in the North, so I understand from a telephone conversation between him and my secretary that he has completed the materials and is sending them back here.

Judge
Can you have a financial statement in 45 days?

Atty. for Mr. Klavan
Oh, I can have it within two weeks, Your Honor.

Judge
I'll give you 30 days.

Atty. for Mr. Klavan
Thank you.

Atty. for Mrs. Klavan
Your Honor, if I could just point out, we did serve them for financial statement in November.

Judge
Well, he can have 30 days. Now, Motion for temporary support.

Atty. for Mr. Klavan (Plaintiff)
I should point out that since the time that we drafted that Motion the plaintiff has lost her job at the [inaudible] and is currently on unemployment.

Judge
Well, there are how many children? Two?

Mrs. Klavan
Two, seventeen and nineteen.

Judge
What's the nineteen year old doing?

Mrs. Klavan
She's a student, in Israel.

Judge
She's . . . that require any support?

Mrs. Klavan
Yes, she is financing her tuition through scholarship but her personal needs, room, board, medical insurance, telephone calls, transportation are all something that either she has to . . .

Judge
What kind of transportation?

Mrs. Klavan
She had to pay her own way to get to Israel.

Judge
She elected to go there?

Mrs. Klavan
Right.

Judge
And there are lots of schools, she could have gone to the University of Massachusetts . . .

Mrs. Klavan
Actually, this school that she's going to in Israel is a part of the State University of New York.

Judge
What does it cost? What do you . . . What kind of expenses are you looking for on a temporary basis for temporary support?

Mrs. Klavan
For both myself and the two children?

Judge
Well, as . . . How about the child. There is something about the other child being in Fort Lauderdale?

Mrs. Klavan
Yes, Michael is living in Fort Lauderdale with my mother and finishing high school there.

Judge
How old is he?

Mrs. Klavan
Seventeen.

Atty. for Plaintiff
Your Honor, we intentionally did not put down any figure on the Motion for temporary support pending receipt of the 401 statement and leaving it to your discretion.

Judge
Well, I don't have to take this Motion up today. If you want another date on it . . .

Atty. for Mr. Klavan
I could put it on, Your Honor, for two weeks. Since 1983 this party has been separated and I can't imagine the emergency, and I would like to look at my client's financial statement, too, and documents.

Judge
Well, first of all the nineteen year old I don't look upon it as support. I know there is case law about that but there is a statute that calls for educational expenses. I would think that it would be more than this situation, where it sounds a little bit to me, at least from what little I've heard, that this young woman is on her own, really. She is making up her own mind where she is going, she is living in Israel. It sounds like educational expenses and not support.

Mrs. Klavan
Well, in truth, the reason that she went to Israel was because she was offered a scholarship. Had she stayed in the United States, she could not have afforded tuition.

Judge
Well, I don't adjudicate cases on . . .

Mrs. Klavan
O.K., but that is why she left.

Judge
. . . what might have been. I adjudicate on what is. She is there. I want to know what her expenses are and I mean her education expenses. And I will consider those. As far as the young man in Florida is concerned, I want to know what it costs to support him and what's going on there and your financial statement would show what your situation is, too, if there is a change in your employment, that should be reflected and updated. Why don't we continue the Motion for a temporary support to some two weeks from now. It will have to be a Tuesday to a Friday. (discussion of available dates with unnamed participant here). Put it for 9:30 the 17th, sometimes we can start earlier and sometimes we can't. It depends on the [inaudible]. O.K.

Attys.
Thank you, Your Honor.

(Tape stops here and restarts with an unrelated case — remainder of tape blank)

CERTIFICATE

I, Nancie Ann Mossman, do hereby certify that the foregoing transcript was prepared by me and is a true and accurate record to the best of my knowledge, skill and ability.

Date: April 9, 1988

_____

Nancie Ann Mossman

COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

NORFOLK, SS. 1988 SITTING

NO. 88-P-1046

GARRIE JOAN KLAVAN
APPELLEE

v.

AVRAM MACY KLAVAN
APPELLANT

APPELLEE'S BRIEF

III. STATEMENT OF THE ISSUE

Whether the Probate and Family Court properly denied the defendant's motion to dismiss based on lack of personal jurisdiction.

IV. ARGUMENT

THE PROBATE AND FAMILY COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS AS THE PLAINTIFF SUSTAINED HER BURDEN OF PROOF AND ESTABLISHED A PRIMA FACIE SHOWING OF PERSONAL JURISDICTION. CONSEQUENTLY, THE JUDGMENT OF DIVORCE NISI IS VALID AND ENFORCEABLE AS THE PROBATE AND FAMILY COURT HAD PERSONAL JURISDICTION OVER THE DEFENDANT.

The defendant's sole contention on appeal is that his motion to dismiss was improperly and erroneously denied by the Probate and Family Court on January 30, 1988, as the Probate and Family Court should have found, based on the evidence before it, that the defendant was served with process in the Commonwealth only after being lured here by the deceit and fraud of his wife. The defendant maintains that, since he was lured into the Commonwealth solely for the purpose of having process served upon him, such service is invalid and should be quashed. As is shown below, the plaintiff marshalled sufficient evidence at the hearing of the defendant's motion to dismiss to fulfill her burden of proof as to establishing personal jurisdiction over the defendant. Accordingly, the Probate and Family Court properly denied the defendant's motion to dismiss. Since the Probate and Family Court had personal jurisdiction over the defendant, the Judgment of Divorce Nisi is valid and enforceable.

The defendant, a resident of Alaska, was served with process as he debarked a plane at Logan airport. (A. p. 17) Thereafter, his counsel filed a special appearance and moved to dismiss the complaint because of an alleged lack of personal jurisdiction over the defendant. "When a defendant challenges personal jurisdiction over him . . . he casts upon the plaintiff the burden of proving the court's jurisdiction." *Val Leasing, Inc.* v. *James Hutson d/b/a Dry Creek Farm*, 674 F.Supp. 53, 55 (D. Mass. 1987) citing *Gray* v. *O'Brien*, 777 F.2d 864, 866 (1st Cir. 1985); *Good Hope Industries, Inc.* v. *Ryder Scott Co.*, 378 Mass. 1, (1979). In the context of a Rule 12(b)(2) motion to dismiss, this burden is easily met. *Welsh* v. *Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980) cert. denied 450 U.S. 981 (1981) ("the burden of the plaintiff [to establish personal jurisdiction in the face of a 12(b)(2) motion to dismiss] is relatively slight and the district court must consider the pleadings and affidavits in a light most favorable to the plaintiff").

> [W]hen personal jurisdiction is challenged, a plaintiff must establish a "threshold" showing of jurisdiction but no more. That is, through affidavits and other competent evidence, a plaintiff must make out a prima facie case for the existence of personal jurisdiction, demonstrating at minimum that there is competent evidence to support each of the relevant jurisdictional requirements.

Val Leasing, Inc., supra at 55. *Accord, Gilday* v. *Quinn*, 547 F.Supp. 803, 806 (D. Mass. 1982); *Walsh* v. *National Seating Co., Inc.*, 411 F.Supp. 564, 567 (D. Mass. 1976); *Nelson by Carson* v. *Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983) (in reversing the dismissal of an action for lack of personal jurisdiction, the court held that when the trial court determines a 12(b)(2) motion on written submissions, a party asserting jurisdiction need only assert a prima facie showing that jurisdiction exists and all factual disputes are resolved in its favor).

In most of the reported cases in which a defendant challenges a court's personal jurisdiction in a motion to dismiss, the defendant is a non-resident and, consequently, the plaintiff's "burden" to prove the court's jurisdiction involves a showing that all relevant requirements of the state's long arm statute have been satisfied and that there exist sufficient minimum contacts between the defendant and the forum to support exercise of personal jurisdiction. *See e.g., Spring* v. *Geriatric Authority of Holyoke*, 394 Mass. 274 (1985); *Good Hope Industries, Inc., supra*; *Droukas* v. *Divers Training Academy*, 375 Mass. 149, (1978); *Raleigh Rug Co., Inc.* v. *R.A. Civitello, Co.*, 23 Mass. App. Ct. 1025, (1987); *Nicholas Associates, Inc.* v. *Starr*, 4 Mass. App. Ct. 91, (1976). In the instant case the court acquired personal jurisdiction over the defendant not through application of the Massachusetts long arm statute, but as a result of the defendant being served while in the Commonwealth. *Thompson* v. *Cowell*, 148 Mass. 552 (1989); Mass. R. Dom. Rel. Pro. 4(d). Thus, in order to establish her "threshold" showing of jurisdiction, the plaintiff need only show that the defendant was served while in the Commonwealth. This showing constitutes a prima facie case which the defendant's allegations of fraud and deceit do not negate. *Val Leasing, Inc., supra* at 55 ("Because the Federal Rules of Civil Procedure contemplate that jurisdictional issues will be determined prior to trial on the merits . . . a plaintiff is not required to go to the time and expense of a full dress jury trial in order to establish the validity of his claim by a fair preponderance of the evidence and a weighing and balancing of the credibility of the relevant witnesses in order to survive a motion to dismiss challenging a Court's personal jurisdiction over the defendant . . .").

It is clear that the defendant himself established the requisite prima facie showing as he conceded in his Affidavit accompanying the motion to dismiss that he received service while in

the Commonwealth. (A. p.17) Upon this evidence alone, the Probate and Family Court was justified in denying the defendant's motion to dismiss. Thus, there was no need whatsoever for the plaintiff to file an affidavit which would, redundantly, allege that the defendant was served with process while in the Commonwealth. Since a prima facie showing of jurisdiction was made, the Probate and Family Court properly denied the defendant's motion to dismiss.[1]

In its brief, the defendant has failed to address the proper standard of review to be applied by the Probate and Family Court in considering the defendant's motion to dismiss (i.e., the plaintiff must establish a prima facie showing of jurisdiction) and has, instead, treated the motion to dismiss as if it were a motion for summary judgment.[2] The defendant argues, that since the plaintiff failed to submit an affidavit in opposition to the defendant's motion to dismiss, all allegations in the defendant's affidavit must necessarily be accepted as true and, accordingly, the Probate and Family Court had no alternative but to accept as true the defendant's contention that his wife lured him into the Commonwealth by fraud and deceit. As noted

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[1] Of course, the defendant could have appealed this denial immediately and/or have challenged the Probate and Family Court's exercise of personal jurisdiction at trial regardless of the denial of the Rule 12(b)(2) motion. If the defendant were sincerely concerned about this matter, he would have requested a full evidentiary hearing. The defendant failed to pursue an interlocutory appeal of the denial of the motion to dismiss and also failed to offer at trial any evidence whatsoever regarding his having been lured into the Commonwealth. Consequently, the plaintiff maintains that the defendant has waived any right to challenge the Probate and Family Court's jurisdiction.

[2] Please note that there is a split of authority as to whether a motion to dismiss pursuant to Rule 12(b)(2), becomes a motion for summary judgment if the parties submit affidavits. *See Spring* v. *Geriatric Authority of Holyoke*, 394 Mass. 274, 292 (1985) (because Probate and Family Court's rulings on a Rule 12(b)(2) motion took into account factual material outside the pleadings, the Supreme Judicial Court treated the order of dismissal as a summary judgment). The weight of authority, however, indicates that such a motion does *not* become a motion for summary judgment. *See, Attwell* v. *LaSalle National Bank*, 607 F.2d 1157 (5th Cir. 1979) (not a motion for summary judgment); *Moore's Federal Practice*, Vol. 2A, ¶12.07[2.-2, n.4].

above, this framing of the issues completely misperceives the standard of review applicable to the defendant's motion to dismiss and focuses on irrelevant allegations of motive and state of mind. Nevertheless, even if: (1) the defendant were correct to disregard the limited scope of the plaintiff 's burden of proof; and (2) the proper standard of review was that applicable under a motion for summary judgment, it does *not* follow that the defendant was entitled to prevail in it's motion to dismiss because the plaintiff chose not to file an affidavit. The Probate and Family Court has discretion to refuse summary judgment even if the opposing party files no opposition and stands mute. *U.S.* v. *31 Photographs,* 156 F.Supp. 350 (D.C. N.Y. 1957). Regardless of the plaintiff 's burden to show jurisdiction, the defendant bears the burden (if this were a motion for summary judgment) to show the lack of a genuine issue of material fact and that he is entitled to judgment as a matter of law. The defendant failed to make this showing.

The defendant is also mistaken in its contention that, since the plaintiff chose not to file an affidavit, the Probate and Family Court was obliged to accept as true the allegations contained in the defendant's affidavit. *See e.g., Cellini* v. *Moss,* 232 F.2d 371 (D.C. Cir. 1956); *Subin* v. *Goldsmith,* 224 F.2d 753 (2nd Cir. 1955) cert. denied 350 U.S. 883. In fact, the Probate and Family Court rightly should have ignored any and all argumentative and conclusory assertions in the defendant's affidavit. *Nichols Associates, Inc.* v. *Starr,* 4 Mass. App. Ct. 91, 93 n.1 (1976). Stripped of argumentative and conclusory assertions, the defendant's affidavit by no means establishes the lack of a genuine issue of material fact or that the defendant is entitled to judgment as a matter of law. By claiming that the plaintiff "became hysterical and screamed I had to come to Boston so that we could talk" (A. p.17) and that the defendant was served with process when he debarked from the plane at Logan, it does *not* necessarily follow

that the plaintiff acted deceitfully or fraudulently. The defendant infers from these allegations that the plaintiff must have intended to deceive the defendant and argues that the Probate and Family Court had no choice but to ascribe to the plaintiff a deceitful state of mind since the plaintiff has not specifically exonerated herself by affidavit. Under Massachusetts law, however, courts rarely grant summary judgment where state of mind is an essential element. *Quincy Mut. Fire Ins. Co.* v. *Abernathy*, 393 Mass. 81 (1984) (the granting of summary judgment is disfavored when state of mind is an element); *Poller* v. *C.B.S.*, 368 U.S. 464 (1962) (a judge must be circumspect when state of mind involved).[3]

As was argued to the Probate and Family Court in the plaintiff's Memorandum in Opposition to the Defendant's Motion to Dismiss (Supp. A. pp. 3-5), the plaintiff was physically disabled and could *not* travel to Vermont to meet her husband. In fact, the plaintiff only decided to have process served on the defendant upon recommendation of counsel *after* the defendant had indicated that he would visit the plaintiff in Boston. (Supp. A. pp. 3-5).[4]

V. CONCLUSION

The Probate and Family Court properly denied the defendant's motion to dismiss since the plaintiff established a prima facie showing of personal jurisdiction over the defendant by showing that the defendant was served with process while he

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[3] It is unlikely that a defendant could ever prevail on a motion for summary judgment which involves allegations of fraud if he supports this motion with only his own affidavit since he does not have "personal knowledge" of the plaintiff's state of mind. *See* Mass. R. Civ. P. 56(e).

[4] The plaintiff was present at the hearing of the defendant's motion to dismiss and was prepared to testify as to these matters if the defendant's counsel chose to examine her. As the requisite prima facie showing was established, counsel for the plaintiff saw no need to examine the plaintiff.

was in the Commonwealth. The fact that the plaintiff chose not to file an affidavit *in no way* undermined the validity of the Probate and Family Court's denial of the defendant's motion to dismiss. Accordingly, the Probate and Family Court had personal jurisdiction over the defendant and the Judgment of Divorce Nisi is valid and enforceable.

In view of the frivolous nature of this appeal, the plaintiff requests that this court award the plaintiff $3,000.00 for the costs and attorney's fees incurred by the plaintiff in answering the defendant's appeal.

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COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

NORFOLK, SS. 1988 SITTING

NO. 88-P-1046

GARRIE JOAN KLAVAN
APPELLEE

v.

AVRAM MACY KLAVAN
APPELLANT

SUPPLEMENTARY APPENDIX

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

TRIAL COURT
PROBATE & FAMILY
DEPARTMENT
No. 86D-1093-D1

GARRIE JOAN KLAVAN
Plaintiff

v.

AVRAM MACY KLAVAN
Defendant

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

In its Motion to Dismiss, the defendant, raises two issues:

1. That the plaintiff obtained personal service on the defendant by fraud and deceit; and

2. That Vermont is a more appropriate forum than Massachusetts to resolve the disputed issues.

This Court should deny the defendant's Motion to Dismiss since the defendant received valid personal service and Massachusetts is a more appropriate forum than Vermont to resolve this action. A more detailed analysis of these issues is provided below.

FACTS

Garrie and Avram Klavan were married in New York on May 29, 1966. In January of 1970, the Klavans moved to Ver-

mont. Garrie and Avram Klavan sought marital counseling beginning in 1980. In January of 1982, Garrie Klavan was diagnosed as suffering from an adrenal tumor. Two months later, Garrie Klavan underwent extensive surgery in an apparently successful attempt to remove the tumor.

Avram Klavan left his wife and two children and moved to Alaska in August of 1983. Twice in 1984, Avram flew to Vermont to visit his wife and children and to explore reconciliation. The parties, however, were unable to resolve their differences. In June of 1984, Garrie discovered that Avram was living with another woman. In January of 1985, Garrie Klavan flew to Alaska to discuss reconciliation with her husband. Avram rejected Garrie's suggestion that she move to Anchorage. At this time, the couple discussed the prospect of divorce.

During the Spring of 1985 financial problems compelled Garrie to leave Vermont. In May of 1985, Garrie Klavan accepted a job with the Harvard Hillel as head chef. She then left Vermont with her two children and moved permanently to Massachusetts in July of 1985. Garrie Klavan has maintained her domicile in Massachusetts since that time.

In August of 1985, Avram flew to Massachusetts to visit Garrie. Again, the parties were unable to reach a reconciliation and Avram returned to Alaska. In October of 1985 the parties acknowledged that divorce was inevitable.

During the summer of 1986, Garrie and Avram made plans to meet in Vermont to discuss divorce. During this same summer, Garrie was compelled to seek emergency medical treatment on three separate occasions prior to their planned rendezvous. On account of these emergency episodes, Garrie was physically unable to travel to Vermont to meet her husband. Accordingly, Garrie telephoned Avram and explained her medical problems. Avram agreed to meet her in Boston as he had done before in order to discuss their divorce. While in Vermont, and prior to flying to Boston, Avram confided to two friends that

he was travelling to Boston to discuss the prospect of divorce with Garrie.

Only after learning that her husband was to visit her in Massachusetts to discuss divorce, did Garrie contact and retain Burns and Levinson to represent her in divorce proceedings.

Avram Klavan received personal service of Garrie's Complaint for Divorce as he disembarked his flight at Logan.

ARGUMENT

I. THIS COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANT AS HE VALIDLY RECEIVED PERSONAL SERVICE WHILE WITHIN THE COMMONWEALTH.

In order for this Court to acquire personal jurisdiction over the defendant, the defendant must either 1) receive personal service while in the Commonwealth, 2) accept service, or 3) come within the provisions of the Massachusetts Long Arm Statute. Mass.R.Dom.Rel.P. 4(d)(1)(2); Mass.G.L.c. 227, §1 (1985); Mass.G.L.c. 223A, §3 (1985).

As shown above, Avram Klavan was served personally with Garrie's Complaint for Divorce while in the Commonwealth. This service is valid and vests this court with personal jurisdiction over the defendant provided that the defendant is present voluntarily, not because of trick or fraud, and not to appear in court on an unrelated matter. *Wolfson* v. *Wolfson*, 455 So.2d 577, 578 (Fla.App. 4 Dist. 1984); *Gulda* v. *Second Nat. Bank of Boston*, 323 Mass. 100 (1948); *Thompson* v. *Lowell*, 148 Mass. 552 (1889).

As stated above, Garrie Klavan was unable to meet with her husband in Vermont in August, 1986 due to her poor state of health. The parties, therefore, made alternative plans for

Avram to meet Garrie in Boston. This was not at all unusual since Avram had previously visited Garrie in Boston. It was also not unusual that the parties were going to discuss divorce. Garrie and Avram had lived apart for three years. Avram had been living with another woman for more than two and a half years. They had discussed reconciliation and rejected it on several occasions. In short, both parties knew that divorce was inevitable. Prior to August of 1986, however, neither party had initiated divorce proceedings. There was no trick or deceit involved in this arrangement.

Only after learning of her husband's imminent visit did Garrie seek Burns & Levinson for legal counsel and was advised to have process served on her husband while he was in the Commonwealth. Avram Klavan was not lured into Massachusetts. Therefore, since Avram Klavan was validly served with process, this Court has personal jurisdiction over the defendant.

II. VERMONT IS NOT AN APPROPRIATE FORUM TO RESOLVE THE PARTIES' DISPUTE.

Simply put, Vermont is not an appropriate forum since *Neither* party has residence there; in fact, each of the parties has resided outside of Vermont for almost 2 years. Moreover, contrary to defendant's assertion, Massachusetts is a more appropriate forum than Vermont to hear this divorce action. This becomes clear when one considers the "comparative advantages of one forum over another." *Doe* v. *Roe*, 377 Mass. 616, 619 (1979).

While Garrie and Avram Klavan lived together in Vermont for approximately thirteen years, neither one of them resides there now. Avram abandoned his wife and children in Vermont in 1983 and established residence in Alaska. Garrie left Ver-

mont in July of 1985 and established residence in Massachusetts. Neither party has any present intention to return to Vermont. The parties do not own any property in Vermont. The Klavan children do not live in Vermont.

Garrie Klavan is a resident of Massachusetts. She pays income tax in Massachusetts. She has a Massachusetts driver's license. She is currently applying for unemployment in Massachusetts. She lives in an apartment in Brookline under a lease in her name.

Moreover, Garrie Klavan intends to remain a Massachusetts resident into the foreseeable future. As shown, the "comparative advantages" weigh heavily in favor of Massachusetts exercising jurisdiction in this case.

This court should also consider that a Vermont Court would not hear the Klavan divorce since neither party is a Vermont resident. A condition precedent to Vermont courts hearing divorce proceedings is that a party reside within the state for a specified period *and retain* residence in the state. Vt. Stat. Ann. Title 15, §592 (1974). Vermont courts are without statutory power to hear divorce cases between non-residents. *Connolly* v. *Connolly*, 132 Vt. 65 (1973). Therefore, since neither Garrie nor Avram Klavan are Vermont residents and neither have retained a residence in Vermont, Vermont courts have no jurisdiction to resolve their dispute.

CONCLUSION

Avram received valid personal service of his wife's complaint for Divorce; he was not tricked or deceived into entering the Commonwealth for this purpose and in fact had met with his wife on a prior occasion. As shown above, Massachusetts is a more appropriate forum than Vermont to hear this divorce

action. For all the above reasons, this Court should deny the defendant's Motion to Dismiss.

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Dated: _____

FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1378

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AVRAM MACY KLAVAN, PETITIONER

v.

GARRIE JOAN KLAVAN, RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

REPLY BRIEF FOR THE PETITIONER

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out in our petition for certiorari (at 9-10) that the issue in this case is virtually identical to the issue presented in Burnham v. California Superior Court, No. 89-44, which has been briefed and argued and is pending decision by this Court. The only difference between the present case and Burnham is that in Burnham the defendant had made several recent visits to the forum state before being served with process. Here, the unfairness of predicating jurisdiction upon the fortuity of service within the state is brought into even sharper focus because petitioner was served during his first contact with the forum state in 20 years. 1/

1/ Respondent suggests (Br. in Opp. 4) that in the time leading up to institution of the divorce action petitioner had travelled to Massachusetts on more than the one occasion during which he was (Cont'd)

Because the instant case presents the same issue that this Court will decide in Burnham, we suggested in the certiorari petition that the Court hold this case for disposition in light of its decision in Burnham. Respondent does not seriously contend that the issues presented here and in Burnham are different. Instead, she asserts that there are procedural reasons why this Court should refuse to take even the modest action of holding this case pending its decision in Burnham, and she makes the rather ironic -- but, in any event, irrelevant -- complaint that granting relief here would enable petitioner to engage in forum shopping. As we now show, however, none of these contentions warrants the extreme

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served. Respondent cites only her own trial court brief for this proposition. Nothing in the record bears out the assertion.

action of denying the petition outright, as respondent urges.

1. Respondent first argues (Br. in Opp. 7) that the issue presented here was not raised in the courts below. While we do not deny that the issue could have been framed more clearly in the lower courts, petitioner plainly did object to the trial court's exercise of personal jurisdiction generally and, in particular, insisted that he did not have the number or kind of contacts with Massachusetts necessary to justify the exercise of jurisdiction.

For example, in his memorandum in support of the motion to dismiss (at 5), petitioner asserted that a "'functional or pragmatic consideration about the comparative advantages of one forum over another * * * tends to become determinative of the constitutional question

itself,'" (quoting Doe v. Roe, 377 Mass. 616, 619, 387 N.E.2d 143, 145 (1979) (emphasis added)). Relying on that proposition, petitioner proceeded to argue that the relevant pragmatic considerations -- that Massachusetts had never been the couple's marital domicile, that the couple's property was not located in Massachusetts, that the couple's business enterprises were not located in Massachusetts, and that the couple's children resided outside of Massachusetts -- compelled the conclusion that it would be inappropriate for the Massachusetts courts to exercise personal jurisdiction. Id. at 5-6.

In his opening appellate brief, petitioner reiterated that he lacked the kind of contacts with Massachusetts necessary to justify personal jurisdiction. Citing Kulko v. Superior Court,

436 U.S. 84 (1978), one of this Court's many cases enunciating the constitutional requirement of minimum contacts, petitioner stated: "Personal jurisdiction depends upon the presence of notice to the defendant and a sufficient connection based upon minimum contacts between the defendant and the forum State to require a defense of the action in the forum State." Br. in Opp. App. 4a. He continued:

> Jurisdiction under the long-arm statute * * * is not applicable in this action. The parties did not maintain a marital domicile in Massachusetts at any time * * * and nothing in the record suggests [petitioner] ever transacted any business in Massachusetts (except for the day he was served with process) to warrant a finding that he had sufficient minimum contacts with Massachusetts to assert jurisdiction under [the long-arm statute's "transacting business" provision].

Id. at 5a n.2.

Thus, respondent is simply wrong in asserting (Br. in Opp. 7) that "[t]he question of whether the Husband had sufficient minimum contacts with Massachusetts is raised for the first time in this appeal." Respondent predicated personal jurisdiction over petitioner solely on his presence in the Commonwealth at the time of service. By objecting to the sufficiency of his contacts with Massachusetts, petitioner plainly was contending that the mere service of process was inadequate to satisfy due process. No greater clarity was required under this Court's precedents. See, e.g., Illinois v. Gates, 462 U.S. 213, 220 (1983) ("'[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for

alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued'") (quoting Dewey v. Des Moines, 173 U.S. 193, 197-198 (1899)); Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 599 (1954) ("appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented").

2. Respondent next argues (Br. in Opp. 8) that petitioner consented to the trial court's jurisdiction by participating in discovery and trial after the

court denied the motion to dismiss. 2/ She suggests that the only ways that petitioner could have preserved his objection to personal jurisdiction were (1) to refuse both to participate in discovery and to appear for trial, and suffer a default judgment as a result; or (2) to seek a stay of the proceedings and file an interlocutory appeal.

This argument is severely misguided for several reasons. First, the Massachusetts Supreme Judicial Court obviously did not view the issue as

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2/ Respondent contends (Br. in Opp. 8) that the equal division of a tax refund between the parties sometime after entry of the divorce judgment also indicates that petitioner had somehow consented to the court's jurisdiction. Aside from being nowhere in the record, the mere fact that the parties may have divided a tax refund equally quite obviously has no bearing on whether petitioner consented to the jurisdiction of the Massachusetts courts.

having been waived. To the contrary, the court below considered this case important enough to transfer to its own docket before the Appeals Court had even considered it, and then after hearing argument it reached the merits of petitioner's personal jurisdiction objection. Since waiver was of no moment to the state court, it should not concern this Court either.

Second, Rule 12(b) of the Massachusetts Rules of Domestic Relations Procedure, which is essentially identical to Rule 12(b) of the Federal Rules of Civil Procedure, expressly provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." This provision eliminates the need to appear specially to challenge a court's jurisdiction and

ensures that parties can defend on the merits without waiving jurisdictional objections. See 5 C. Wright & A. Miller, Federal Practice & Procedure § 1344, at 521-524 (1969).

Third, the Supreme Judicial Court expressly rejected respondent's very argument over 70 years ago, holding that a defendant did not waive his objection to personal jurisdiction by filing an answer on the merits and participating in discovery after the trial court refused to allow him to appear specially to challenge jurisdiction. The court stated: "[T]his contention cannot be supported. After having raised the point seasonably, [defendant] did not waive it by proceeding in accordance with the rulings of the court, which until reversed were the law of the trial." Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 19-20, 112 N.E.

500, 503 (1916). 3/ See also Cohn v. Carlisle, 310 Mass. 126, 129, 37 N.E.2d 260, 263 (1941) ("A defendant cannot for the first time complain of defective service of process after he has partici-

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3/ The cases cited by respondent do not alter this holding. In Leffler v. Todd, 316 Mass. 227, 55 N.E.2d 767 (1944), the defendant-intervenor attempted to appear specially to obtain a determination of his right to certain disputed funds, but at the same time he sought an adjudication that the plaintiff had no cause of action against him. The Supreme Judicial Court stated: "We do not think that one specially appearing as a claimant can seek an adjudication of the plaintiff's claim against himself as a defendant and general relief without submitting personally as a defendant to the jurisdiction of the court." Id. at 232, 55 N.E.2d at 769. The situation in Leffler is thus plainly different from cases like Jaynes and the present one in which a defendant appears for the sole purpose of contesting jurisdiction and proceeds to litigate the merits of the case only after his motion to dismiss is denied.

Bateman v. Wood, 297 Mass. 483, 9 N.E.2d 375 (1937), is even less apposite than Leffler. In Bateman, the defendant entered a special appearance to contest (Cont'd)

pated in a hearing upon the merits.") (emphasis added).

This Court also has expressly rejected respondent's argument, stating:

> The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground * * *; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not

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the adequacy of service. The Supreme Judicial Court pointed out that had the defendant made a general appearance, she would have lost the right to contest service, but, because she entered a special appearance, her right was preserved. Bateman says absolutely nothing about the effect of litigating a case after the trial court has issued an unfavorable ruling on a challenge to personal jurisdiction.

> considered as aban]doning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting on the illegality, that the objection is deemed to be waived.

Harkness v. Hyde, 98 U.S. 476, 479 (1879).

Finally, respondent's contention is contrary to sound judicial policy because it is irrational to encourage, let alone require, defendants to take interlocutory appeals. Massachusetts, like all other jurisdictions, disfavors such appeals because they are burdensome and inefficient. See, e.g., Mood v. Kilgore, 384 Mass. 459, 462, 425 N.E.2d 341, 343 (1981); Cappadona v. Riverside 400 Function Room, Inc., 372 Mass. 167, 169, 360 N.E.2d 1048, 1050 (1977).

In sum, respondent's suggestion (Br. in Opp. 8 (citation omitted)) that

petitioner "'purposefully availed [himself] of the privilege of conducting activities within'" Massachusetts by defending himself at trial is ludicrous. Petitioner did not choose to be sued in Massachusetts; it was respondent who brought suit there. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See also Kulko, 436 U.S. at 93-94.

3. Respondent also asserts (Br. in Opp. 9) that the relief we seek in the petition would be unreasonably burdensome for her. She accuses petitioner of engaging in "forum shopping" and complains that she should not have to relitigate her divorce action in the courts of another state.

This argument is remarkable, given that it is respondent who engaged in forum shopping by suing petitioner in a jurisdiction with which he had not the slightest contact. Moreover, the question before this Court is simply whether the "minimum contacts" analysis applies when the defendant is served in the forum state, an issue as to which the hardship to any particular plaintiff is plainly irrelevant. If the Court holds in the affirmative in Burnham, it need only remand this case to the Massachusetts courts for reconsideration in light of that decision. It then will fall to the Massachusetts courts to determine whether petitioner's contacts with the Commonwealth were sufficient to justify the exercise of jurisdiction. The hardship to respondent is arguably relevant to that determination, although "the burden

on the defendant" remains the "primary concern." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (emphasis added).

For the foregoing reasons and for the reasons stated in the petition, the petition should be held for disposition in light of the Court's decision in Burnham.

Respectfully submitted.

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MAY 1990